

IN THE HIGH COURT OF TRIPURA
AGARTALA

R.S.A. No. 44 of 2009

- 1. Smt. Shyamali Debnath**
wife of late Harendra Kr. Debnath
- 2. Smt. Swapna Debnath (Malakar)**
daughter of late Harendra Kr. Debnath
wife of Sri Prabhas Malakar
- 3. Shri Madhab Debnath,**
son of late Harendra Kr. Debnath

All are residents of Fulbari Kandi,
P.O. Nurpur, P.S. Kailashahar,
North Tripura

..... **Appellants**

**** As per order dated 21.11.2012
passed in CM. Appl. No. 115 of 2012,
the appellants No.1,2 & 3 has been
substituted as the legal heirs of the
sole appellant, namely, Lt. Harendra
Kr. Debnath.**

- V e r s u s -

- 1. Ashir Mohammed,**
son of late Munshi Abdul Karim,
- 2. Rezual Haque,**
son of Ashir Mohammed
- 3. Sayadul Haque,**
son of Ashir Mohammed
- 4. Maizul Haque,**
son of Ashir Mohammed

All of Fulbari Kandi, P.O. Nurpur,
P.S. Kailashahar, North Tripura

- 5. Smti. Sushama Debi,**
daughter of late Surendra Kr.
Debnath, Village - Fulbari Kandi,
P.O. Nurpur, P.S. Kailashahar,
North Tripura

6. **Smt. Kokila Debi,**
daughter of late Surendra Kr.
Debnath and wife of late Aswini
Debnath of Ratibari, P.S. Fatikroy,
North Tripura
7. **Sri Sukhamoy Debnath,**
son of late Suresh Debnath,
8. **Smt. Sumati Debi,**
wife of Sri Prabin Debnath,

Both of Rajnagar, P.S. Dharmanagar,
North Tripura
9. **Shri Boloram Debnath,**
husband of late Sukriti Debnath,
10. **Shri Subrata Debnath,**
son of Shri Boloram Debnath

All of Pabiachara (Kumarghat), P.S.
Fatikroy, now residing at Saidarpar,
Fatikroy, North Tripura
11. **Shri Biresh Debnath,**
son of late Naresh Debnath,
12. **Shri Bisweswar Debnath,**
son of late Naresh Debnath
13. **Smt. Draupadi Debi alias Dorpadi Debi,**
wife of late Naresh Debnath
14. **Smt. Pratima Debi,**
daughter of Naresh Debnath

All of Fulbari Kandi,
P.S. Kailashahar, North Tripura,
now Uakoti Tripura
15. **Smt. Usha Rani Debi,**
wife of Shri Ananta Debnath of
Bhagaban Nagar, P.S. Kailashahar,
North Tripura
16. **Smt. Uma Rani Debi,**
wife of Shri Anil Debnath of
Sonaimuri, P.S. Fatikroy, North
Tripura

- 17. Smt. Unmadini Debi,**
wife of Shri Krishna Debnath of
Chandipur, P.S. Kailashahar, North
Tripura

All daughters of late Indramani
Debnath

- 18. Smt. Ramani Bala Debi,**
wife of Shri Surendra Debnath of
Bhagaban Nagar, P.S. Kailashahar,
North Tripura

..... Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants : Mr. S. Deb, Sr. Advocate
Mr. P. Dutta, Advocate

For the respondents : Mr. C.S. Sinha, Advocate

Date of hearing : **07.04.2015**
& delivery of Judgment & order

Whether fit for reporting :

YES	NO
√	

JUDGMENT & ORDER (ORAL)

By this appeal filed under Section 100 of the C.P.C., the judgment and decree dated 30.09.2008 delivered in Title Appeal No. 12 of 2008 by the Additional District Judge, North Tripura, Kailashahar has been challenged.

[2] At the time of admitting this appeal, this Court formulated the following substantial questions of law:

(1) Whether the learned first appellate court committed error, in the eye of law, by holding that in view of the provisions prescribed by the Hindu Succession Act, 1956 and Hindu Marriage Act, 1955, the second wife of the deceased Surendra Debnath was entitled to inherit the properties belonging to late Surendra Debnath.

(2) Whether the learned first appellate court committed error by holding that the said deed executed by the second wife of late Surendra Debnath was valid in the eye of law?

[3] Mr. S. Deb, learned senior counsel appearing for the appellant at the outset has candidly submitted that he would not press the substantial question No.1. He would address the substantial question No.2 as according to him, there lies the real controversy.

[4] For purpose of appreciating the substantial question of law as indicated, a very brief prospectus of the relevant fact is being introduced in the beginning. This case is an example how a civil suit can be dragged for a long time for non-application of mind by the concerned judges. The case was remanded twice in exercise of the power under Order XLI Rule 25 of the C.P.C. and the impugned judgment is the third judgment given by the first appellate court.

[5] On the basis of the judgment dated 30.06.2000 delivered in Title Suit No.01 of 1994 which has been instituted for partition of the Schedule-I and Schedule-II properties which devolved to the plaintiffs by virtue of the title deed dated 12.08.1988, Exbt.9. From the crux of the judgment, the decree dated 30.06.2008 had been drawn up dismissing the suit. Against the said judgment and decree, an appeal under Section 96 of the C.P.C. had been preferred by the plaintiffs being Title Appeal No.26 of 2000. The first appellate court even though set aside the judgment and decree dated 30.06.2006 but on framing additional issue as noted below directed the trial court to decide that

issue within a period of 6(six) months and take necessary steps under Order XLI Rule 25 of the C.P.C.

Additional Issue

"Whether the deed dated 12.08.1988 is binding upon the defendant No.1."

[6] Thereafter, by the judgment dated 08.09.2006, the trial court has decided the additional issue holding as under:

"Accordingly, I find that the suit land was not amicably partitioned between the co-sharers. I also find that a portion of the dwelling house has fallen within the boundary of the suit land. So, in view of the legal proposition this Exhibit-9, i.e., the deed dated 12.03.1988 is not binding upon the defendant No.1. Hence, this issue is decided against the plaintiffs.

Now the case record should be sent to the Appellate Court, i.e., learned Judge, Fast Track Court, North Tripura, Kailashahar as per provision of Order XLI Rule 25 of the C.P.C."

[7] Having received the records from the trial court, the first appellate court by the judgment dated 15.12.2006 passed in Title Appeal No.26 of 2000 has again remanded the case on framing 3(three) other issues which read as under:

(i) Whether the suit is maintainable in its present form?

(ii) Whether the plaintiffs brought all the properties of common origin into record for partition among the respective shareholders?

(iii) Whether the plaintiffs are entitled to get any relief and if so, up to what extent?

[8] What is noticeable that the first appellate court in its judgment has not expressed its opinion as regards the finding returned by the trial court on 08.09.2006 in response to the additional issue so framed by the first appellate court by its

judgment dated 28.06.2003. The first appellate court has also directed the trial court to decide those issues within a period of 6(six) months and take steps in accordance with Order XLI Rule 25 of the C.P.C. The trial Court by the judgment dated 04.02.2008 delivered in Title Suit (P) of 1994 after recording the history of the case has observed that:

It has also been found that a portion of the dwelling house has fallen within the boundary of instant suit land. So, in view of legal position Exhibit-9, i.e., deed 12.08.1988 has been decided to be not binding upon the defendant No.1. This decision has not yet been set aside by appellate court. As the Exhibit-9 is not binding upon defendant No.1 and as there is no amicable partition of the left estate of Surendra Debnath, the instant suit filed by the plaintiff is clearly not maintainable in its present form.

On that premises and also on deciding the other issues so referred to him, the suit was dismissed by the trial court.

[9] Thereafter, a fresh appeal has been filed by the plaintiffs being Title Appeal No.12 of 2008. A complete departure from the provisions of Order XLI Rule 25 of the C.P.C. is thus registered. There should not have been any new appeal as whenever a matter is remanded under Order XLI Rule 25 of the C.P.C., it is the mandate of the law, the appeal remains undecided pending the finding returned by the trial Court on the basis of the reference made to it on additional issue or issues. The appeal should be decided on merit. However, on waiving this technical approach, the title appeal being Title Appeal No.12 of 2008 is treated as continuation of Title appeal No.26 of 2002. Thus, the difficulty as indicated is purged.

[10] By the impugned judgment and order, the first appellate court has observed that:

From the copy of the judgment of objection case No.16 and 18 (Exhibit '13') I find that defendant No.3 filed objection against the recording of the land in the name of Harendra Kumar Debnath alone in Khatian No.49 and Khatian on.407. After considering all aspects it was ordered that Khatian No.49 shall be recorded in the name of Harendra Kumar Debnath, Sushma Debi, Subhangini Debi, Suresh Nath and Naresh Nath. Thus again I hold that the defendant Nos.2 and 3 had absolute right to transfer their own share of land from Khatian No.49. Similarly I hold that defendant No.3 also had absolute right to transfer the land measuring .45 acres to plaintiff No.1 vide deed dated 12-08-88 (Exhibit '10').

[11] On such premises, by the impugned judgment, the first appellate court has also observed that:

The plaintiffs No.2,3 and 4 have acquired right and title over the C.S. Plot No.1845, land measuring .88 acres, C.S. Plot No.1926 (new), 1597/1945 (old), land measuring .28 acres, C.S. Plot No.2031, land measuring .26 acres which we recorded under Khatian No.475 and they further acquired right and title over the C.S. Plot No.408 (new), land measuring .17 acres, C.S. plot No.414, land measuring .52 acres which were recorded under Khatian No.49 of Mouja-Ichapur.

[12] From the description, it may not be difficult to identify the land. If the descriptions are compared with the descriptions of the scheduled land/properties as provided in the plaint, it would transpire that those lands are the same land as described in the first schedule and the second schedule, appended to the plaint. It has been further observed that the plaintiff No.1 has also acquired title over the land pertaining to C.S. Plots No.412 and 413(new) measuring .45 acres under Khatian No.682. On the face of such

declaration of allotment by demarcation of the land having specified boundary is in permissible in law in a preliminary decree. In a suit for partition such demarcation by metes and bound is permissible after the judgment and preliminary decree declaring shares in joint property is passed, but the partition could not be carried out amicably. Thus, the impugned judgment and decree is liable to be set aside on that account. Apart that, the very premise of such declaration has surfaced from abject non-consideration of the statutory provisions, such as section 23 of the Hindu Succession Act, 1956 as it stood before 09.09.2005, when by the Hindu Succession (Amendment) Act, 2005, Section 23 of the Hindu Succession Act has been repealed. But the Court is obliged to decide the respective rights or the reliefs as existed on the day when the suit was instituted. There is no dispute that the suit was filed by the respondent-appellants on 07.01.1994. Un-amended Section 23 of the Hindu Succession Act provides as under:

23. Special provision respecting dwelling houses.- Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein.

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

[Emphasis added]

[13] Section 23 had created a strict bar as to the claim of partition over the property left by a Hindu male, who died intestate leaving both male and female descendants.

[14] Mr. S. Deb, learned senior counsel has contended that if this provision is truly interpreted it is amenable to the interpretation that the female descendants/heirs are not even permitted to transfer any share. On the face of the provision itself, this Court is unable to accept such contention. However, there cannot be any amount of doubt that the female descendant being the heir of the male Hindu who died intestate did not have any right till 09.09.2005 to claim partition, unless the partition took place at the instance of the male descendants or heirs of the Hindu male who died intestate. Thus, this Court finds that the finding as returned by the trial court by the judgment and decree dated 04.02.2008 is unsustainable. There cannot be general declaration that the deed dated 12.08.1988 is not binding on the defendant No.1. It definitely binds the defendant No.1 for a very limited purpose. When the partition shall take place, the plaintiffs would be entitled to their respective share but before that the plaintiffs do not have any right to claim partition. Thus the suit being T.S.01(Partition) of 1994 was bound to be dismissed and it had been rightly dismissed. But the finding that has been returned by the impugned judgment is entirely unsustainable. Accordingly, this judgment and decree are set aside.

[15] Having held so, this appeal is allowed, however, subject to the observation that after 09.09.2005 the plaintiffs' right to claim

partition over the Schedule-I and Schedule-II properties, appended to the plaint, has taken a new character in view of the Hindu Succession (Amendment) Act, 2005. The right as emerged can be exercised by the plaintiffs notwithstanding the outcome of the appeal.

Send the LCRs immediately after preparation of the decree.

JUDGE

Sujay